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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PATSY T. MINK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency and other named appellees in the court below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 21–29) is not yet reported. The order of the district court (Appendix C, *infra*, pp. 32–33) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 31) was entered on October 15, 1971. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Freedom of Information Act exempts from its disclosure requirements certain categories of government documents. The questions presented are:

1. Whether the district court may make an *in camera* inspection of documents exempt from disclosure under 5 U.S.C. 552(b)(1) because they are "required by Executive order to be kept secret in the interest of the national defense or foreign policy," for the purpose of releasing portions of such documents which it finds to be "non-secret components."

2. Whether the district court may review *in camera* documents exempt from disclosure under 5 U.S.C. 552(b)(5) because they are inter-agency memoranda, for the purpose of selecting and making available to the public portions of such memoranda which the court determines are "factual" and not "inextricably intertwined with policymaking processes."

STATUTE AND EXECUTIVE ORDER INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the

extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

* * * * *

(b) This section does not apply to matters that are—

(1) specificially required by Executive order to be kept secret in the interest of the national defense or foreign policy;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

Executive Order 10501, as amended, 3 C.F.R. 292 (Jan. 1, 1971), provides in pertinent part:

SECTION 1. *Classification categories.* Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. * * *

* * * * *

SEC. 3. *Classification.* Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General.* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmittal Letters.* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

STATEMENT

Respondents, who are 33 members of Congress, brought this action under the Freedom of Information Act, 5 U.S.C. 552, to compel the release to them of documents prepared for the use of the President in connection with the underground nuclear test scheduled for Amchitka Island, Alaska.[1] The government moved to dismiss the action, or in the alternative for summary judgment, on the ground that the requested materials were specifically exempted from disclosure under 5 U.S.C. 552(b)(1) and (5) (Exemptions 1 and 5). Exemption 1 excludes from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Exemption 5 excludes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In support of its motion the government filed an affidavit of Under Secretary of State John N. Irwin, II. He stated that in January, 1969 the President established a Committee known as the "Under Secretaries Committee", which was chaired by Mr. Irwin and which is a constituent part of the National Security Council System. The affidavit described the assignment given by the President to the Under Sec-

[1] A separate action, brought in the district court to enjoin the test itself, was before this Court on an application for an injunction. *Committee for Nuclear Responsibility, Inc.* v. *Schlesinger*, O.T. 1971, No. A–483. The Court denied the injunction on November 6, 1971 (40 U.S.L.W. 3214) and the Amchitka test was conducted on that date.

retaries Committee in connection with the annual underground test program as follows:

> 3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events.

Pursuant to the presidential direction, the Under Secretaries Committee prepared a report for the underground test "Cannikin" which was the test conducted at Amchitka Island. The documents in the report, as described in pargraph 5 of the affidavit, are:

> A. A memorandum prepared by me to the President dated July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.
>
> B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:
>
> 1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the

Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above,

> highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

Mr. Irwin's affidavit also noted that the documents described as "Top Secret" and "Secret" had been classified pursuant to Executive Order No. 10501, and that those described as Restricted Data had been classified pursuant to The Atomic Energy Act of 1954 (42 U.S.C. (y), 2161, and 2162).

The district court held that the requested documents were "exempted from compelled disclosure by 5 U.S.C. 552(b)(1) and * * * 5 U.S.C. 552(b)(5)." Accordingly it granted the government's motion for summary judgment, and dismissed the action.[2]

The court of appeals reversed and remanded the case to the district court to inspect the documents *in camera* and to determine whether disclosure should be ordered as to any of the materials in the report. Noting that "[s]ecrecy by association is not favored," the court of appeals directed disclosure of any "non-secret" portions of the documents classified pursuant to Executive Order 10501 "[i]f the non-secret components are separable from the secret remainder and may be read sepa-

[2] The district court also dismissed plaintiffs' action insofar as they sought relief in their official capacity. The court of appeals did not rule on that aspect of the case, and it is not germane to the issues presented in the present petition.

rately without distortion of meaning[.]"[3] (Appendix A. infra, p. 27). In addition, the court ordered that the documents which the government claimed to be within the inter or intra-agency memoranda Exemption 5 of the Act, were to be reviewed *in camera* for disclosure "of factual information unless it is inextricably intertwined with policy making processes"[4] (Appendix A. *infra,* p. 28).

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning the proper role of the courts in suits brought under the Freedom of Information Act.[5] That Act generally makes government records available for public inspection.

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[3] The court noted that Section 3(c) of Executive Order 10501 provides for "only one over-all classification, notwithstanding that pages, paragraphs, sections or components thereof bear different classifications." That provision also directs that the document should bear the classification "at least as high as that of its highest component." (App. A, *infra*, p. 27.)

[4] The court of appeals also held that documents which, although attached to a classified file, were not independently classified, are not within the exemption for secret material. We do not challenge in this petition that aspect of the decision below.

[5] The fact that respondents are members of Congress has no bearing on their statutory right to release of the documents in question. Under the Act a document which is required to be released at all, must be released to "any person". 5 U.S.C. 552 (a)(3); S. Rep. No. 813, 89th Cong., 1st Sess. 5; H. Rep. No. 1497, 89th Cong., 2d Sess. 10; *Sterling Drug Co.* v. *F.T.C.* (C.A.D.C., No. 24,878, decided September 22, 1971), slip op. 9–11; Davis, *Administrative Law Treatise*, 1970 Supplement, Chapter 3A, § 3A.4, pp. 120–122.

The Act specifies, however, nine categories of documents to which the disclosure requirements do not apply. Two of these exempt categories are applicable to the material for which disclosure is sought in this case—Exemption 1, which covers material "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy", and Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(1), (5). At issue here is whether the courts may undertake *in camera* inspection of documents which need not be disclosed by virtue of these exemptions for the purpose of determining whether portions of those documents ought to be released. The holding below directs judicial inquiry into matters which are peculiarly within the province of the Executive and is inconsistent with the language and purposes of Exemptions 1 and 5. If sustained, this holding would create serious problems for the executive branch of the government. Accordingly, review by this Court is warranted.[6]

[6] As the result of discovery proceedings in the separate action (discussed *supra*, n. 1) seeking to enjoin the test (*The Committee for Nuclear Responsibility, Inc., et al.* v. *Seaborg* (D.D.C., Civil Action No. 1346–71), some of the documents involved in the present case (with certain deletions)) have already been made public. As to the material which has now been made public, we do not seek any relief from this Court.

1. *The Exemption for Secret Material (Exemption 1).*

Exemption 1 exempts from disclosure "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy". 5 U.S.C. 552 (b)(1). The materials for which this Exemption is claimed here are the documents classified "Secret" or "Top Secret" pursuant to Executive Order 10501. The pertinent legislative history makes it clear that Exemption 1 was specifically intended to protect from disclosure records which are classified pursuant to Executive Order 10501. See, *E.g.*, H. Rep. 1497, 89th Cong., 2d Sess. 9–10; 112 Cong. Rec. 13659 (Rep. Gallagher).[7] Representative Moss, Chairman of the House Government Information Subcommittee, stated, during Hearings Before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.*, 89th Cong., 1st Sess., Part 1, March 30, 1965, pp. 14–15, that:

> We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. Now, that is very broad. That means that any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other

[7] Representative Moss also stated during the House hearings that 5 U.S.C. 552(b)(1) "was intended to specifically recognize that Executive order [No. 10501]" (*id.* at 52), and is drafted "in conformity with that Executive order" (*id.*, April 1, 1965, at 105).

> nations can, by appropriate designation, be excluded from the provisions of this act.
>
> We recognize that there are going to be certain needs to keep some of this information locked up. And the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classification * * *.

Contrary to the view of the court of appeals, Exemption 1 protects from disclosure a document that is classified pursuant to an executive order regardless of the fact that certain pages or paragraphs of that document might not, standing alone, require clasification. The language of the statute in no way implies that courts are empowered to determine whether parts of a document that is entirely exempt from disclosure as a result of the executive order can nonetheless be ordered disclosed on the basis of a court's judgment as to what portions, if any, may safely be disclosed without adversely affecting national defense or foreign policy. Executive Order 10501 specifies that "The document, * * * shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications." (Section 3(c)). Accordingly, the documents in question here are exempt in their entirety under the statute.

This construction of Exemption 1 is consistent with longstanding principles of judicial restraint under which this Court has refused to review the discretion

of the Executive in the areas of national defense and foreign relations.[8]

As Mr. Justice Stewart recently explained (*New York Times Co.* v. *United States*, 403 U.S. 713, 728–729, concurring opinion):

> If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of

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[8] See, *e.g.*, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111, where the Court stated:

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly rsesponsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320–322; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *Orloff* v. *Willoughby*, 345 U.S. 83; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317–318.

internal security necessary to exercise that power successfully. * * * [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.[9]

[9] In *Moss* v. *Laird* (D.D.C., Civil Action No. 1254–71) and *Fisher* v. *Department of Defense* (D.D.C., Civil Action No. 1865–71) both decided December 7, 1971, the district court (*per* Judge Gesell) held that certain portions of the Pentagon Papers which had been classified pursuant to Executive Order 10501 (and had not been made public) were exempt from disclosure under the Freedom of Information Act by virtue of Exemption 1. In rejecting even *in camera* inspection the court stated (Slip op. 3–4):

> ... The determination of the interests of national defense or foreign policy cannot be made by applying some simple litmus test to a document presented, particularly in a case such as this where good faith is not in issue. The Court, with no experience or background in such matters, would require detailed *ex parte* background briefing even to make a tentative judgment and thus the litigation would proceed in secret with those seeking the data wholly excluded.
>
> The Freedom of Information Act was not designed to open all Government files indiscriminately to public inspection. Obviously documents involving such matters as military plans and foreign negotiations are peculiarly the type of documents entitled to confidentiality. The orderly processes of government and indeed the stability of the country itself so require. Congress recognized this in the Act and the Constitution has no requirement to the contrary. . . .

Indeed, it is difficult to imagine what feasible criteria the courts could apply in determining whether portions of a classified document may be released.

In *Epstein* v. *Resor*, 421 F. 2d 930 (C.A. 9), certiorari denied, 398 U.S. 965, the Ninth Circuit held that Exemption 1 applied to a file classified pursuant to Executive Order 10501 and declined to order *in camera* inspection. The court rejected the reasoning espoused by the D.C. Circuit here that it is appropriate for judges to evaluate independently the need to classify material in the interest of national security. The court noted that (*id.* at 933).

> * * * The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.

No court other than the court below has suggested that it is appropriate for judges to determine in a suit brought under the Freedom of Information Act whether various portions of a classified document ought to be released.

2. *The Exemption for Inter- or Intra-Agency Memoranda (Exemption 5).*

The court of appeals also ordered the district court to make an *in camera* inspection of the materials for which Exemption 5 is claimed, for the purpose of releasing "factual information" which is not "inextricably intertwined with policymaking processes." Exemption 5 protects materials which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". This language contains no suggestion that the exemption applies only to non-factual parts of internal memoranda.

Indeed, the legislative history of Exemption 5 shows that Congress rejected such a limitation on the Exemption. An earlier draft of the Bill which ultimately became the Freedom of Information Act limited the Exemption to "intra-agency or interagency memorandums or letters dealing solely with matters of law or policy". This language was intended to make available "[a]ll *factual* material in Government records * * *" S. Rep. No. 1219, 88th Cong., 2d Sess. 6–7, 17 (Emphasis in the original). In response to criticism that the exemption as then drafted was not broad enough and that it should encompass both factual material and opinions contained in internal memoranda,[10] the earlier language was deleted in favor of

[10] See, *e.g.*, Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 89th Cong., 1st Sess. (May, 1965) 36; 94–95; 112–113; 205; 236–237, 244; 366–367; 402–403; 417; 437, 450. Hearings Before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.*, 89th Cong., 1st Sess., Part 1, March and April, 1965, pp. 223–224; 229–230; 240; 256.

the present text, with the express purpose of guaranteeing "frank discussion of legal or policy matters" by governmental officials. S. Rep. No. 813, *supra*, at 9.

As the legislative history and the decided cases indicate, the internal memoranda and letters which fall within Exemption 5 are those which contain advice and recommendations on matters of policy, and as such would not "routinely" be subject to discovery in litigation. See, *e.g.*, H. Rep. No. 1497, 89th Cong., 2d Sess. 10; *Sterling Drug, Co.* v. *Federal Trade Commission* (C.A.D.C., No. 24,878, decided September 22, 1971), slip op., pp. 9–11. Essentially, the protection afforded by Exemption 5 is based upon "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359 (C.A. 2). See also H. Rep. No. 1497, 89th Cong., 2d Sess. 10; S. Rep. No. 813, 89th Cong., 1st Sess. 9; *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (C.A.D.C.).

We submit that Congress intended to assure candid and complete internal discussion of all aspects of sensitive governmental problems, including the factual discussion upon which advice is predicated. Indeed, the distinction for these purposes between factual matters and matters related to the "policymaking process," is highly unrealistic, for the selection and presentation of factual background bearing on a particular decision is virtually certain to be "inextricably bound" with the decision-making process. The documents under con-

sideration in this case were prepared "solely for the purpose of giving advice to the President" in connection with his decision whether to carry out a nuclear test. As Congress recognized in enacting Exemption 5, the President and other executive decision makers would be severely disadvantaged if their staff personnel and advisors were required to "operate in a fishbowl" with respect to the material they select for presentation in internal memoranda. S. Rep. No. 813, *supra*, at 9.[11]

[11] The court below appears to have relied in part upon the rule it has applied in the discovery context that factual reports in government files may be subject to discovery in litigation. See, *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654, 662 (C.A.D.C.); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C.), certiorari denied, 375 U.S. 896. Cf. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C.), affirmed, 384 F. 2d 979 (C.A.D.C.), certiorari denied, 389 U.S. 952; *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl., *per* Mr. Justice Reed). The court below has made this same distinction in other Information Act cases. See, *e.g.*, *Soucie* v. *David*, 448 F. 2d 1067, 1077–1078 (involving the Garwin Report on the SST); *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (involving Commission reports compiled in connection with a rule-making proceeding). This rule, however, does not apply to materials, such as those in question here, which are entirely advisory in nature. See, *e.g.*, *Boeing Airplane Co* v. *Coggeshall*, *supra*; *Machin* v. *Zuckert*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
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JANUARY 1972.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 71-1708

PATSY T. MINK, ET AL., APPELLANTS

v.

ENVIRONMENTAL PROTECTION AGENCY, WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

On Appellants' Motion for Summary Reversal

Decided October 15, 1971

Mr. Ramsey Clark, with whom *Mr. Kenneth C. Bass, III,* was on the motion, for appellants.

Mr. Jeffrey Axelrad, Attorney, Department of Justice, with whom *Messrs. Morton Hollander* and *Harland F. Leathers,* Attorneys, Department of Justice, were on the opposition to the motion, for appellees.

Before FAHY, *Senior Circuit Judge,* and LEVENTHAL and WILKEY,* *Circuit Judges.*

Per Curiam: This is a suit brought by 33 members of Congress, in both their official and private capacities, under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1970), to obtain several documents pertaining to an underground nuclear test

* Circuit Judge Wilkey did not participate in the consideration of this case.

exposion which had been scheduled to take place on Amchitka Island, Alaska.[1]

Priority is given by the Act to such suits in the District Court, see 5 U.S.C. 552(a)(3) (1970). In accordance with this Congressional policy, we provide comparable expedition in the appellate court.

I

Appellees, who were defendants in the District Court, admit the existence of the documents in question, which are concerned with the environmental, national defense, and foreign relations consequences of the planned test. The documents were prepared in report form by a special committee chaired by Honorable John Irwin, Undersecretary of State. The Committee was established by the President on January 20, 1969, and is part of the National Security Council system. The President, on June 27, 1969, directed the Committee to review the annual underground nuclear test program. Pursuant to this direction the Committee prepared a report on the Alaskan nuclear test (code-named Cannikin).

As a result of an apparent leakage of certain portions of the report that suggested some agency disapproval of the test, Representative Patsy Mink asked the White House for copies of the report. The request was denied and this suit followed, with 32 other Members of Congress joining Representative Mink as plaintiffs. They sought summary judgment to compel disclosure of the requested documents. Appellees, de-

[1] The test was originally scheduled for October, 1971, but Congress has provided that it may not take place sooner than May, 1972, unless the President gives his direct approval for an earlier date. *Cf. The Committee For Nuclear Responsibility, Inc. v. Seaborg*, No. 71-1732, October 5, 1971.

fendants, filed an answer, a supporting affidavit executed by Undersecretary Irwin, and a motion to dismiss or in the alternative for summary judgment. A hearing was held on August 27, 1971, before the District Court. The District Court thereafter entered an order which dismissed the complaint insofar as plaintiffs sought to maintain their action in their capacity as Members of Congress, on the ground that they failed to state a justiciable case by virtue of the Separation of Powers doctrine. Insofar as plaintiffs proceeded in their private capacity, the District Court refused to compel disclosure on the grounds that the documents fell within two of the nine exemptions contained in the FOIA, 5 U.S.C. 552(b)(1) (national defense and foreign affairs secrets) and 5 U.S.C. 552 (b)(5) (inter-agency memoranda). Plaintiffs, appellants, noted an appeal, and now move in this court for summary reversal.

II

Congress tailored the Freedom of Information Act to require federal agencies to make information available to any person, unless that information must be withheld for a purpose that Congress deemed paramount to disclosure. Those matters requiring secrecy have been defined in nine exemptions to free disclosure. The two exemptions at issue in this case permit withholding of matters if they are: "(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy . . . (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[2]

The Freedom of Information Act post-dates a 1953 Executive Order—No. 10501—that provides for classi-

[2] 5 U.S.C. 552(b)(1), (5).

fication of matters relating to national defense.[3] The legislative history of the Act does not define clearly the relationship between this Executive Order and the exemption of national defense and foreign affairs secrets of 5 U.S.C. § 552(b)(1). Since the passage of the Act, the Executive Order has continued to be the authority for classification of matters relating to national defense. Appellants argue that the national defense and foreign affairs secrets exemption requires each and every document that an agency wishes to withhold to be classified by separate Executive Order and not by the present classification procedure. After examining the various interpretations given this exemption,[4] we conclude that summary disposition of this issue by this court is inappropriate, and should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand.

We do conclude, however, that summary disposition is appropriate in part, for the purpose of remand, on two of the matters before us.

1. The critical paper before us is the affidavit of Undersecretary Irwin, and particularly its paragraph 5.[5] We note first his statement that the documents in

[3] 3 C.F.R. 292 (1970).

[4] *Compare Epstein* v. *Resor*, 421 F.2d 930, 933 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970). SEN. REP. 813, 89th Cong., 1st Sess. (1965) at 8. *with* H.R. REP. 1497, 89th Cong., 1st Sess. (1966) at 9–10, DEPT. OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE A.P.A. (1967) at 30.

[5] 5. "In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by me to the President dated

question include a memorandum from the Council on Environmental Quality to Undersecretary Irwin which is attached to the classified report, but "is separately unclassified." Appellees' justification for

July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin dated June, 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense

this bunching of all appendanges according to the highest classification of the document to which they are attached is based on the following paragraph of section three of Executive Order 10501:[6]

> (b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the FOIA, enacted subsequently to the Executive Order.

The papers before us contain an assertion, based on an account in the New York Times, that the only reason for the Secret classification of the recommendation transmitted to Undersecretary Irwin by William D. Ruckelshaus, Administrator of the Environmental Protection Agency, is an instruction put on the basis that the entire file would be classified Secret. We take note that Undersecretary Irwin's affidavit identifies certain items (B 1, 2 and 4) as "separately classified,"

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and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully appraised of varying viewpoints and have been used for no other purpose."

[6] 3 C.F.R. 295 (1970).

but no such statement is made as to the letter from the Administrator of E.P.A., or from Russell Train, Chairman of the Council on Environmental Quality, or from Dr. Edward E. David, Jr., for the Office of Science and Technology. This is not a case where the mere disclosure of the fact of the inquiry is itself secret.

However, we do not think that a matter as important as this is to be determined on the basis of Undersecretary Irwin's affidavit as it stands. Under our remand, the District Court will take evidence on whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivision (b)(1) solely by virtue of their association with separately classified documents.

The following provision of Executive Order 10501 requires our attention since it is likely to be involved on remand:

> (c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

The same reasoning applies to this provision as to the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed.

2. Similar treatment must be accorded on remand with respect to the Government's claim for exemption under subdivision (b)(5). The Court has recently considered that exemption in *Soucie* v. *David,* No. 24,573, April 13, 1971, and there is no need to review that opinion at length. It suffices to say that while the exemption protects the decisional processes of the President, or other policy-making executive officials, it does not prevent the disclosure of factual information unless it is inextricably intertwined with policymaking processes.[7]

III

We turn to the procedure to be followed by the District Court in carrying out the terms of our remand. In approaching this problem we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense. In the exemption from disclosure contained in Section 552(b)(1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation. Accordingly, *in camera* consideration of the documents by the District Court, looking toward their possible separation for purposes of disclosure or nondisclosure, is necessary, else the possibility of nondisclosure under the guides we have stated would be defeated. Moreover, although we have held in *Soucie v. David, supra,* that the policy of the Act requires that the exemptions from disclosure prescribed by FOIA be construed narrowly, this admonition must be tempered somewhat when the documents

[7] *Soucie* v. *David*, slip opinion at 18.

contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing. In considering the documents also under the exemption granted by Section 552(b)(5) the District Court *in camera* will likewise have in mind, in possibly separating out factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs.

As already noted, this opinion does not deal with all the questions argued to us. It suffices that for the reasons noted the summary judgment denying all relief to plaintiffs must be reversed, and the case remanded forthwith for further consideration by the District Court.

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1708

PATSY T. MINK, ET AL., APPELLANTS

v.

ENVIRONMENTAL PROTECTION AGENCY, WILLIAM D. RUCKELSHAUS, ADMINISTRATOR ENVIRONMENTAL PROTECTION AGENCY

Civil Action 1614-71—September Term, 1971

Before: FAHY, Senior Circuit Judge, LEVENTHAL and WILKEY, Circuit Judges

ORDER

It is ORDERED by the Court, *sua sponte,* that footnote 1 in the opinion filed herein on October 15, 1971, is amended to read as follows:

[1] The test was originally scheduled for October 1971. Congress has provided that it may not take place unless the President gives his direct approval. Pub. L. No. 92-134, 85 Stat. 365 (1971). *Cf., The Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, No. 71-1732, October 5, 1971.

Per Curiam.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 71–1703

PATSY T. MINK, ET AL., APPELLANTS

v.

ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

Civil Action 1614–71—September Term, 1971

Before: FAHY, Senior Circuit Judge, and LEVENTHAL and WILKEY,* Circuit Judges.

ORDER

This case came on for consideration on appellants' motion for summary reversal and appellees' opposition to the motion, and the Court heard argument of counsel. On consideration of the foregoing, it is

ORDERED by this Court that the judgment of the District Court appealed from herein is hereby reversed, and this case is hereby remanded to the District Court for further consideration in accordance with the opinion of this Court filed herein this date.

The Clerk is directed to issue a copy of the opinion and a certified copy of this order to the District Court forthwith.

Per Curiam.

For the Court:

NATHAN J. PAULSON,
Clerk.

Dated: OCTOBER 15, 1971.

Opinion per curiam.

* Circuit Judge Wilkey did not participate in the consideration of this case.

APPENDIX C

United States District Court for the District of Columbia

PATSY T. MINK, ET AL., PLAINTIFFS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

Civil Action No. 1614–71

ORDER

This cause having come before the Court on plaintiffs' motions for preliminary injunction and summary judgment and defendants' motion to dismiss or, in the alternative, for summary judgment; upon consideration of the argument of counsel, the record and memoranda of the parties; and the Court being fully advised in the premises, it is by the Court this 27th day of August 1971,

ORDERED as follows:

(1) defendants' motion to dismiss is granted insofar as plaintiffs seek to maintain the action in their capacity as Members of Congress on the ground that plaintiffs have failed to present a justiciable case or controversy and they may not maintain the action in that capacity by reason of the Separation of Powers provisions of the Constitution;

(2) insofar as plaintiffs maintain this action as individuals, defendants' motion for summary judgment is granted on the grounds that each of the documents plaintiffs seek is exempted from compelled disclosure

by 5 U.S.C. 552(b)(1) and that each of the documents plaintiffs seek is exempted from compelled disclosure by 5 U.S.C. 552(b)(5);

(3) plaintiffs' motion for summary judgment is denied; and

(4) plaintiffs' motion for preliminary injunction is denied as moot; and, it is

FURTHER ORDERED that the action is hereby dismissed.

GEORGE L. HART, Jr.,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1972